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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 NUTRISHARE, INC.,) Case No. 08cv1493-JM (BLM)
12)
13 Plaintiff,) **NOTICE AND ORDER SETTING EARLY**
14) **NEUTRAL EVALUATION CONFERENCE**
15 v.)
16 BIORX, LLC,)
17)
18 Defendant.)
19 _____)

20 **IT IS HEREBY ORDERED** that an Early Neutral Evaluation ("ENE")
21 of your case will be held on October 6, 2008 at 1:30 p.m. in the
22 chambers of the Honorable Barbara L. Major, United States Magistrate
23 Judge, located at 940 Front Street, Suite 5140, San Diego,
24 California, 92101.

25 **The following are mandatory guidelines for the parties**
26 **preparing for the Early Neutral Evaluation Conference.**

27 1. **Purpose of Conference:** The purpose of the ENE is to
28 permit an informal discussion between the attorneys, parties, and
the settlement judge of every aspect of the lawsuit in an effort to
achieve an early resolution of the case. All conference discussions
will be informal, off the record, privileged, and confidential.

1 Counsel for any non-English speaking party is responsible for
2 arranging for the appearance of an interpreter at the conference.

3 2. **Personal Appearance of Parties Required:** All parties,
4 adjusters for insured defendants, and other representatives of a
5 party having full and complete authority to enter into a binding
6 settlement, and the principal attorneys responsible for the
7 litigation, must be present **in person** and legally and factually
8 prepared to discuss settlement of the case. Counsel appearing
9 without their clients (whether or not counsel has been given
10 settlement authority) will be cause for immediate imposition of
11 sanctions and may also result in the immediate termination of the
12 conference.

13 Unless there are extraordinary circumstances, persons required
14 to attend the conference pursuant to this Order shall not be excused
15 from personal attendance. **Requests for excuse from attendance for**
16 **extraordinary circumstances shall be made in writing at least three**
17 **(3) court days prior to the conference.** Failure to appear at the
18 ENE conference will be grounds for sanctions.

19 3. **Full Settlement Authority Required:** In addition to
20 counsel who will try the case, a party or party representative with
21 full settlement authority¹ must be present for the conference. In
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23 ¹ "Full settlement authority" means that the individuals at the settlement
24 conference must be authorized to explore settlement options fully and to agree at
25 that time to any settlement terms acceptable to the parties. Heileman Brewing Co.
26 v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989). The person needs to have
27 "unfettered discretion and authority" to change the settlement position of a
28 party. Pitman v. Brinker Int'l, Inc., 216 F.R.D. 481, 485-86 (D. Ariz. 2003).
The purpose of requiring a person with unlimited settlement authority to attend
the conference contemplates that the person's view of the case may be altered
during the face to face conference. Id. at 486. A limited or a sum certain of
authority is not adequate. See Nick v. Morgan's Foods, Inc., 270 F.3d 590, 595-97
(8th Cir. 2001).

1 the case of a corporate entity, an authorized representative of the
2 corporation who is not retained outside counsel must be present and
3 must have discretionary authority to commit the company to pay an
4 amount up to the amount of the Plaintiff's prayer (excluding
5 punitive damages prayers). The purpose of this requirement is to
6 have representatives present who can settle the case during the
7 course of the conference without consulting a superior. Counsel for
8 a government entity may be excused from this requirement so long as
9 the government attorney who attends the ENE conference (1) has
10 primary responsibility for handling the case, and (2) may negotiate
11 settlement offers which the attorney is willing to recommend to the
12 government official having ultimate settlement authority.

13 4. **Confidential ENE Statements Required:** No later than five
14 (5) court days prior to the ENE, the parties shall submit
15 confidential statements no more than ten (10) pages² in length
16 directly to the chambers of the Honorable Barbara L. Major. **These**
17 **confidential statements shall not be filed or served on opposing**
18 **counsel.** Each party's confidential statement must include the
19 following:

20 a. A brief description of the case, the claims and/or
21 counterclaims asserted, and the applicable defenses or position
22 regarding the asserted claims;

23 b. A specific and current demand or offer for settlement
24 addressing all relief or remedies sought. If a specific demand or
25 offer for settlement cannot be made at the time the brief is
26 submitted, then the reasons therefore must be stated along with a

27 ² The parties shall not append attachments or exhibits to the ENE
28 statement.

1 statement as to when the party will be in a position to state a
2 demand or make an offer; and

3 c. A brief description of any previous settlement
4 negotiations, mediation sessions, or mediation efforts.

5 General statements that a party will "negotiate in good faith"
6 is not a specific demand or offer contemplated by this Order. It
7 is assumed that all parties will negotiate in good faith.

8 5. **New Parties Must be Notified by Plaintiff's Counsel:**
9 Plaintiff's counsel shall give notice of the ENE to parties
10 responding to the complaint after the date of this notice.

11 6. **Requests to Continue an ENE Conference:** Local Rule
12 16.1(c) requires that an ENE take place within forty-five (45) days
13 of the filing of the first answer. Requests to continue ENES are
14 rarely granted. However, the Court will consider formal, written,
15 *ex parte* requests to continue an ENE conference when extraordinary
16 circumstances exist that make a continuance appropriate. In and of
17 itself, having to travel a long distance to appear in person is not
18 "extraordinary." **Absent extraordinary circumstances, requests for**
19 **continuances will not be considered unless submitted in writing no**
20 **fewer than seven (7) days prior to the scheduled conference.**

21
22 DATED: September 2, 2008

23 

24 BARBARA L. MAJOR
25 United States Magistrate Judge

26 COPY TO:

27 HONORABLE JEFFREY T. MILLER
28 U.S. DISTRICT JUDGE

ALL COUNSEL

NOTICE OF RIGHT TO CONSENT TO TRIAL
BEFORE A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. § 636(c), you are hereby notified that a U.S. Magistrate Judge of this district may, upon the consent of all parties, on Form 1A available in the Clerk's Office, conduct any or all proceedings, including a jury or non-jury trial, and order the entry of a final judgment. Counsel for the plaintiff shall be responsible for obtaining the consent of all parties, should they desire to consent.

You should be aware that your decision to consent or not to consent is entirely voluntary and should be communicated solely to the Clerk of Court. Only if all parties consent will the Judge or Magistrate Judge to whom the case has been assigned be informed of your decision.

Judgments of U.S. Magistrate Judges are appealable to the U.S. Court of Appeals in accordance with this statute and the Federal Rules of Appellate Procedure.